Supreme Court, U.S.
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No. 97-1387

In The

Supreme Court of the United States

October Term, 1997

JASON SCOTT ROOF,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Michigan

BRIEF IN OPPOSITION

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QUESTION PRESENTED

DOES PETITIONER PRESENT A FEDERAL QUESTION SUITABLE FOR REVIEW BY THIS COURT?

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BRIEF IN OPPOSITION

Respondent, the People of the State of Michigan, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

In his petition, petitioner incorrectly states that the opinion of the Michigan Supreme Court denying leave to appeal is unreported. The fact that leave to appeal was denied is reported at 456 Mich 893; ___ NW2d ___ (1997).

STATEMENT OF THE CASE

Respondent submits the following additional information to supplement and correct Petitioner's description of the proceedings below.

Petitioner correctly states that shortly after the murder the police interviewed petitioner and videotaped his confession at length. What is glossed over in Petitioner's version of the proceedings below is how this videotape came to be introduced into evidence at trial and portions of it played to the jury by the parties.

Both the prosecutor and Petitioner's trial counsel were given a copy of the complete original videotape well in advance of trial. The prosecutor did not want to introduce the whole videotape into evidence because in his opinion some portions of it consisted of irrelevant self-serving, rambling, non-responsive verbiage intended by

Petitioner to mitigate and minimize his guilt. The prosecutor wanted to play for the jury only those portions of the videotape dealing with the crime and Petitioner's role in it.

However, Petitioner's trial counsel did want portions of the videotape played to the jury which the prosecutor felt were inappropriate in his case-in-chief, namely those parts of the videotape which he felt tended to show Petitioner's state of mind shortly after he committed the murder.

An agreement was reached by the parties prior to the pretrial conference. See Respondent's Appendix A. The prosecutor and Petitioner's trial counsel stipulated that the whole videotape would be introduced into evidence. However, the prosecutor would play for the jury only those portions he felt appropriate to his case-in-chief and after the People rested, Petitioner's trial counsel could then play to the jury any of the videotape he believed to be appropriate to Petitioner's defense.

This is exactly what happened at trial. In fact, it was Petitioner's trial counsel who first brought the fact that there was a videotaped confession to the attention of the jury. See Respondent's Appendix B. The complete original videotape was introduced as evidence by stipulation of the parties as People's Exhibit 38. See Respondent's Appendix C. The prosecutor created an excerpted version of the videotape from the original and showed this to the jury as his Exhibit 39. See Respondent's Appendix D. Petitioner's trial counsel also created an excerpted version from the original and showed this version to the jury as his Exhibit G. See Respondent's Appendix E. Neither

party objected because each party was able to play those portions of the videotape appropriate to his case. The portions irrelevant and/or immaterial to the case before the court were never played for the jury although the complete original tape was admitted into evidence as People's Exhibit 38 and was available to the jury to view if they so desired.

Petitioner's assertion in his petition that the prosecutor showed an "altered" tape to the jury and that petitioner's trial counsel "showed some portions of the unedited tape to the jury" is a mischaracterization of what occurred. Each party took the original videotape and from this original created an excerpted version containing only those portions of the interview relevant to their case and each party then played those excerpted versions to the jury. See Respondent's Appendices D and E.

Contrary to Petitioner's contention to this Court, no part of the videotape of the police interview of Petitioner material to either the prosecutor's case or Petitioner's defense was erroneously withheld from the jury's consideration.

REASONS FOR DENYING THE WRIT

Petitioner seeks review on the grounds that the Michigan courts erred where an "edited" videotape was admitted in evidence in the absence of safeguards to assure the integrity or propriety of the "editing" process.

Additionally, Petitioner asserts that an erroneous standard of review was used to evaluate the issue in the Michigan courts.

The writ should be denied. This Court does not "sit as a court of criminal appeals to review state cases. The states are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution." *Burgett v State of Texas*, 398 U.S. 109, 114-115, 88 S.Ct. 258, 261, 19 L.Ed. 2d 319 (1967). Petitioner has not presented a federal question for review by this Court.

Petitioner raises four specific concerns about the procedures used by the trial court regarding the admission of the videotape. However, as early in the proceedings as the pretrial hearing the parties stipulated that there were no problems with the exhibits in the case. See Respondent's Appendix A. The entire original videotape was admitted into evidence by stipulation as People's Exhibit 38. Consequently, the trial court had little to do regarding the admission of the tape. However, Petitioner's four specific concerns about the tape "editing" process are without merit.

1. Petitioner raises a question about who did the "editing" and the methods used. This was not an issue at the trial because the original videotape was *never edited*. Both parties had a copy of the original videotape and simply created an excerpted version by omitting those portions of it that they did not want to play to the jury in the presentation of their case. Since the original tape was never edited, editing process was not an issue at trial.

2. Petitioner raises a question about the lack of information regarding how the decision was made regarding what was "edited". Again, the original tape was never edited. Any decision as to what was excerpted to create each party's tape was made by each party based upon what each party felt was appropriate to his case. No objections were voiced by either party as to the content of the other party's excerpted tape.

3. Petitioner's contention to this Court that his trial counsel had apparently not examined the tape prior to its being shown to the jury is absurd in light of the facts of this case. Petitioner's trial attorney not only had a copy of the entire original videotape at an early stage in the proceedings but created his own excerpted version to show the jury in preparation of Petitioner's defense.

4. Petitioner's contention that there is nothing on the record to indicate that the trial court viewed the "edited" tape(s) prior to their being shown to the jury is another red herring. The parties stipulated to the admission of the original tape and each other's excerpted version. Absent objection by either party, absent any concern by anyone, the trial court would not have had occasion to view the tape(s).

Petitioner, by glossing over the facts in the case, is attempting to persuade this Court that he was prejudiced by the fact that the tape shown to the jury by the prosecutor focused on the *actus reus* or the crime itself and not on Petitioner's defense. The implication being that Petitioner and the jury were thereby deprived of exculpatory evidence. However, neither Petitioner nor the jury were deprived of this material because Petitioner himself

showed this part of the interview to the jury in his defense. See Respondent's Appendix E.

This is not a case involving questions about the integrity of the filtering process used to insure that a tape has not been altered and the cases cited by Petitioner in this regard are not remotely applicable to the facts in the instant case. Nor does the instant case involve a recording of a police informant and a defendant.

Lastly, Petitioner would have this Court issue a writ of certiorari and hold that, although Petitioner stipulated to the introduction of the evidence at issue both before trial and during the trial itself, Respondent has somehow lost the right to argue that Petitioner waived his right to appeal the introduction of that evidence. The consequence being that Petitioner is entitled to the application of a lower standard of review on appeal. Respondent is at a loss to follow the logic of Petitioner's argument. The instant case does not involve the mere failure of a party to voice an objection at trial, but rather a stipulation to the introduction of evidence. In the instant case, the Michigan Court of Appeals correctly applied Michigan law in this regard. Further, in the brief time constraints imposed for filing this Brief, Respondent has been unable to find any federal or state cases even remotely on point. However, in the event that this Court grants a writ of certiorari Respondent reserves the right to vigorously argue against Petitioner's preposterous supposition.

CONCLUSION

For the reasons presented in this Brief In Opposition, the Petition should be denied.

Respectfully submitted,

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Respondent's Appendix D contains a transcript of the introduction without objection of Plaintiff's Exhibit 39, the prosecutor's edited video-tape played to the jury in his case-in-chief..... A-9

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APPENDIX A

STATE OF MICHIGAN

IN THE COURT FOR THE COUNTY OF ST. CLAIR

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

-vs-

Case No.
O-93-002856-FC

JASON S. ROOF,

Defendant.

_____/

At a session held at the County Building, Port Huron, Michigan, on January 3, 1994.

PRESENT: HONORABLE ERNEST F. OPPLIGER
Circuit Judge

PRETRIAL STATEMENT

1. This is a charge of: Count I, Open murder, occurring on or about July 27, 1993 in the Township of St. Clair, County of St. Clair, State of Michigan, contrary to 750.316-C.

2. Defendant shall have 21 days in which to file motions in this case.

3. Prosecutor shall make available to defense counsel a list of all witnesses including res gestae witnesses known to the prosecutor or investigating officer pursuant to MCLA 767.40(a).

4. The Defendant shall have 21 days to file a motion for a Walker Hearing if he deems it necessary.

5. Prosecutor and defense counsel stipulate there are no problems with exhibits.

6. Estimated jury trial time 4 days.

/s/ Ernest F. Oppliger
Circuit Judge

APPENDIX B

* * *

[p. 118] this case is. You will see a lot of physical evidence to go with that.

Between the time that I am done, finish talking with you now, and the time that I have the opportunity to talk to you again in closing argument, everything you hear in this courtroom will not be from me to you, but you will hear a dissertation and questions and answers from me to witnesses, from the Defense Lawyer to witnesses, and you will see physical evidence.

You essentially are going to be witnesses to what happens here, and what you witness is what you will use to make your decision. So you can see how extremely important it is to listen closely and pay attention to the evidence that's presented, regardless of who presents it.

Thank you.

THE COURT: You may proceed.

MR. FORSYTH: Ladies and gentlemen, as the Defense Counsel in this case, I may shock you by saying that we are not disputing the fact that my client did, in fact, kill this little chid. [sic] A lot of evidence that you are going to hear from the Prosecutor surrounds the killing of that child. He will call witness after witness to display before you the graphic details of the death. It is not our position to dispute much of that testimony, but one thing he has not mentioned to you is that he is [p. 119] going to show you a videotaped confession from my client that was taken beginning 5:40 a.m. after he had told the police where the body was. And you are going to

have plenty of opportunity to view this tape because it's a videotape. Then you're going to have to make a decision, but you can't make that decision until you've heard from the Defendant's side of the case. That decision for this trial must wait.

You are going to hear about Jason Roof. You're going to hear from people like Penny, who was there the night that this occurred. The Prosecutor is not calling her, but we are. You are going to hear from Jason Roof's parents. You are going to hear from his sister. You are going to hear from people that know Jason Roof.

Why is that important? Because you are going to remember that tape. You're going to remember about the graphic details of Christopher Aalto.

It's a horrible death. There is no way around it. We are not going to try and soft-peddle it. It's a horrible death. But when you hear all this testimony, you are going to have to decide: Did the Prosecutor, in fact, prove that my client, Jason Roof, committed first degree murder? First degree murder.

How are you going to make that decision? The Judge will instruct you on the law. As the Prosecutor [p. 120] pointed out the components, there has to be an intent to kill. There has to be premeditation. Premeditation is the time to think something out.

You will hear certain words in the confession that will give you clues about whether or not Jason Roof had this premeditation before this killing occurred.

You will also hear about deliberation. That's the time to think about how you are going to do it.

You are going to hear other words from Jason Roof, videotaped by this detective, of what occurred over a two and a half hour period. You're not going to hear two and a half hours of confession, but you are going to hear what happened, what Jason Roof says out of his own mouth on that evening. Yet you still not – cannot reach a verdict until all of the evidence in [sic] in, until the attorneys have argued their case, until the Judge has given you the instructions.

One of the things you're going to be asking is, who is Jason Roof? And one of the things you're going to be asking is why. The Prosecutor doesn't have to prove why. But I submit to you you will be asking why. And when you hear all this testimony, I don't think it's going to be answered. But I submit to you that the Prosecutor's case as it relates to first degree murder, that he does not have sufficient evidence to show that my client – and [p. 121] you will hear all this evidence – did, in fact, commit premeditated, deliberate murder.

What's the difference? Second degree murder says that there has to be intent to kill. But there is not this time to think it out beforehand. It's a difference. We accord a higher degree of murder for those who plan and think about how they are going to kill somebody, and then accomplish that act in order to carry it out.

And again, when you listen to the videotape of Jason Roof's confession, you are going to hear about what he did, how he did it, and you will again hear the words to help you decide what type of killing this was.

You are also going to hear about Jason Roof's mental problems. You are going to hear about his being petitioned to Probate Court. You are going to hear about threats to others. You are going to hear about a troubled young man. But in the end, you ladies and gentlemen are going to have to decide and render a verdict in this matter.

Thank you.

THE COURT: You may proceed.

MR. BROWN: Thank you, your Honor. May I pull the podium to the back here?

THE COURT: Yes.

* * *

APPENDIX C

* * *

[p. 350] Q This hour and 40 minute interview, was that tape recorded, video –

A Yes, it was videotape recorded.

Q In that hour and 40 minutes, did you just talk about this – what happened that night or did you talk about other things?

A In fact, in the hour and 40 minutes we spent very little time talking about the actual event. We talked a lot about Jason's life and other things. A small portion of that was used to talk about the actual event of the evening.

Q Okay. I'm going to hand you what's been marked as People's Proposed Exhibit 38.

Can you tell me what this is, please?

A Yes. That's a copy of the – or that is the original videotape that was – that I removed from my camcorder in my office. I've marked it with a property tag on the date and time in question, and I also reviewed that tape in its entirety on 6-22, and I have initialed that it is the same tape I had back in 1993.

MR. BROWN: Your Honor, by stipulation of counsel, I move to admit Exhibit 38.

MR. FORSYTH: No objection.

THE COURT: Admitted.

BY MR. BROWN:

APPENDIX D

* * *

[p. 351] Q Now, was that videotape then condensed down, edited, if you will, to show just the parts that Jason is talking about the events of that evening?

A Yes. I believe that was done by your office.

Q I'm going to show you People's Proposed Exhibit 39, and ask you if you had a chance to review that and if that is the edited version of that same videotape which is entered as 38?

A Yes. I had an opportunity to review this tape in its entirety in my office, and I initialed the tape that I had reviewed. It is a composite of the original tape and edited version of the original tape.

Q So on this tape you will see from time to time blanks, and that's where it's been edited?

A That's correct. You will see darkened spots.

MR. BROWN: Your Honor, I move to admit Exhibit 39.

MR. FORSYTH: No objection.

THE COURT: Admitted.

MR. BROWN: Can I play this for the jury?

THE COURT: Yes, certainly.

(Whereupon, People's Exhibit 39, a videotape was played to the jury as follows:)

APPENDIX E

* * *

[p. 499] leakage here last night but I think it's supposed to go in the bucket that's catching it here now. They tell me everything is under control. We'll now proceed with the case.

MR. FORSYTH: Thank you, your Honor.

Your Honor, I would like to introduce Defendant's Proposed Exhibit Number G, which is an edited portion of the taped confession of my client. This was – this tape was copied from the original tape and I believe that it contains those areas that were not covered under the edited portion of the Prosecutor's tape or at least some of those portions, and I would move to admit this proposed exhibit at this time.

MR. BROWN: I have no objection, your Honor.

THE COURT: All right. The exhibit is admitted, Defendant's Exhibit G.

MR. FORSYTH: Your Honor, I propose to play this to the jury.

THE COURT: All right.

(Whereupon, Defendant's Exhibit G, a videotape, was played to the jury as follows:)

THE DEFENDANT: . . . This thing of building up anger. That's why I'm on medication. I build up, I hold [p. 500] my anger in and I build it up. And it builds up, builds up, builds up, and until finally it's got to come out somehow, either I get in a fight or I do – I just do

something stupid. I sit around, then I start thinking this stuff. I don't know why. I just do. I have been seeking a psychiatrist. I have been seeing a counselor. I have been on four medications in the last six to eight months.

DETECTIVE LaRUE: Walter Bradtke?

THE DEFENDANT: I am supposed to see him tomorrow at 1:00 o'clock.

DETECTIVE LaRUE: Who is the psychiatrist?

THE DEFENDANT: Doctor Katz. Maybe one of them could come down here to talk to me or something. I told the officer about it, Coronado, –

DETECTIVE LaRUE: Yes.

THE DEFENDANT: – he said: Well, maybe we can set something up for you.

DETECTIVE LaRUE: Do you think maybe you can do that?

THE DEFENDANT: I told him I want to talk to the guy.

DETECTIVE LaRUE: Okay. We'll see what we can do.

THE DEFENDANT: Because they have got a caseload [p. 501] and all that stuff and they know what's going on with me, the problems I have. First they diagnosed me as a manic depressive, but eventually ruled that out and diagnose [sic] me as a – having intermittent and explosive personality disorder.

DETECTIVE LaRUE: Intermittent, meaning it doesn't happen all the time, it just – like you said, it just kind of builds up and builds up?

THE DEFENDANT: Yes. I had problems when I was in the Service. I was in four fistfights. I was constantly in trouble with my superiors. Tired of their shit. I almost got smoked bad a couple of times, for telling people off that I shouldn't have told off. You know, I've got this habit of, you know, people giving me shit and I know they are wrong and they know they can't do it. I'll argue with them and I'll tell them they are wrong. One guy, all those names, NCO, and I flat out told him: Don't do that to me. I know you can't do that to me, and if you keep going, I'm going to press charges on you, for deliberate – after that, the guy never bothered me. We were friends when we separated because he left before I did, but I had problems in the service with this, too, and I tried to get psychiatric help, they wouldn't help me.

DETECTIVE LaRUE: They wouldn't let you talk to [p. 502] a counselor?

THE DEFENDANT: Well, I blew up right before we were supposed to go to the big island for a month long deployment, started cutting up my equipment and smashing things in my room, and I told them, I said – I told my platoon leader, I said: Sir, I can't handle this. I am going bonkers. And he said: Well, you know, there is not much I can do for you right here because we're leaving tomorrow morning, but maybe, you know, I'll get you set up, you know, talk to somebody when we get there.

Couple weeks after we get there, I got to talk to some captain who was a psychiatrist. I talked to him twice and

he said: When we get back, I'm going to talk to your command officer and see if I can have you come in and talk to me a couple times and we'll see what's going on, and we'll see what diagnosis, see if we can get you some medication or something. He never did that. So I was close to leaving, so I just blew it off.

I don't know where I stand. This is just – I've told my counselor all this crap. I told my parents this. And I get – my moods will change a lot. I am going through four moods in the day before. It's just – change like this. I will be nice, happy, you know, really, you know, good moods, ready to pump – ready to go out and do something. All of a sudden it will just change [p. 503] and I'll start getting angry and it's like I got a fire in my veins. I get this – destructive. I smash things in my parents' home. I put holes in the wall. I have smashed furniture. I put dents in my cars. I smashed the hell out of one car one time, flattened it. It was about this high when I got done with it. I dropped the whole top of it with an axe. I get destructive. I get in my mood, I get destructive. I don't know what to do with it. It's undirected energy, and I don't know how to change it. I can't deal with it. I'm trying to understand that myself. I have been trying to under – trying to understand some of the things I've done for the last couple of years and I can't figure it out. I don't know why I do it. There is something wrong inside of my body that's making me do this shit. Something genetic or it's a chemical imbalance or something, something that – twisting in the way I should be, because I basically reject society. I reject government. I reject religion. I subject religion to my own views, and I am the kind of person that, you know, believes more or less in science. I don't

believe the whole universe was created by a – one being. I believe there is other people out there. I believe they're contacting us, or trying to. You know. It's bullshit. I can't stand listening to these religious people tell me that we are the only people in the [p. 504] universe. That's bullshit.

DETECTIVE LaRUE: It doesn't make sense to you?

THE DEFENDANT: No.

DETECTIVE LaRUE: Okay.

THE DEFENDANT: This race is basically a child race. The dinosaurs were on this planet longer than we were. This is a young, stupid race. They haven't pulled their head out of their ass yet. We're destroying the whole planet. You know, I got – sit around and look at this shit and agree with it. Basically you live with it. I can't do it. I can't – I can't deal with it. It bothers me, to be here.

DETECTIVE LaRUE: In the universal sense –

THE DEFENDANT: Yes. The planet.

DETECTIVE LaRUE: Yes.

THE DEFENDANT: I often told me if I had a ship and I could take, you know – if I had a good girlfriend, I could take her and a bunch of supplies, skate off the planet and go find my own planet to live on, start a whole new race, I would do it.

DETECTIVE LaRUE: Have you ever – ever dream about it?

THE DEFENDANT: I build up. I build up stress. I build up anger. You – just piled up until I get to a point where I explode. I have no way – I haven't really [p. 505] learned how to deal with my anger. So I build it up. I hold it inside of me.

DETECTIVE LaRUE: Is that what happened today?

THE DEFENDANT: Yes. Last time I did it was maybe two months before I left the Service, I got in a fight with a guy who tried to pick a fight with me when I was in the bathroom taking a leak, and we both just come back from the – and he said I broke something of his, which I didn't. He was just looking for a fight. And started pushing me and I pushed him back and then he hit me in the jaw, then I just clobbered the shit out of him. I threw a wash machine on him. I had coyboy [sic] boots on, I smashed his face with my cowboy boots. I smashed his nose. He had blood squirting all over the place, and some guy that was downstairs watching the desk came upstairs and stopped me, told me he was going to call the MP, and I was so mad, I said: Go ahead and call the MP. I'll take care of them, too. I said – I was pissed. He kept going at it for a little bit and we got downstairs and I cooled off and he cooled off, and he apologized to me, and then was even.

DETECTIVE LaRUE: How much did you drink last night?

THE DEFENDANT: About two and a half drinks.

DETECTIVE LaRUE: Okay. Of what?

[p. 506] (playing of the tape concluded)

THE COURT: That's it?

MR. FORSYTH: That's it, your Honor.

THE COURT: Okay.

MR. FORSYTH: And Defendant rests.

MR. BROWN: Your Honor, I have a legal matter I would like to take up out of the presence of the jury.

THE COURT: We're going to review a legal matter at this time, and while we're doing that, you may retire to the jury room.

(Whereupon, the jury was excused, after which the following proceedings were had:)

MR. BROWN: May I proceed, your Honor?

THE COURT: Yes, you may.

MR. BROWN: Your Honor, I need some directions, I guess, from the Court at this point in time. Prosecution has placed their evidence in and the Defense has just rested. The Defense has indicated that their defense is one of insanity, diminished capacity. I have supplied the Court through your research clerk, your Honor, a copy of a memorandum I had, along with Mr. Forsyth has a copy of that as well.

* * *